

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

**VIRNETX INC. AND
LEIDOS, INC.,**

§
§
§
§
§
§
§
§

Civil Action No. 6:12-cv-855-RWS

v.

JURY TRIAL DEMANDED

APPLE INC.

APPLE'S NOTICE OF PROPOSED INADMISSIBILITY OF PRIOR ADJUDICATIONS

Pursuant to the Court's request at the March 20, 2018 Pretrial Conference, and following meet and confer conferences with counsel for VirnetX,¹ Apple submits this Notice providing its positions regarding the inadmissibility of prior adjudications. Apple believes that there are ways to address all disputed issues between the parties without reference to any prior adjudications or appeals, prior procedural history or prior versions of accused products. What Apple seeks to exclude at the forthcoming -855 trial is the following:

- Any reference to a prior determination of infringement of FaceTime or VPN on Demand, including:
 - suggestions that Apple went “back to infringing”;
 - suggestions that the “Always” mode of VPN on Demand infringed;
 - reference to non-removal of “Always” mode in iOS 6.1 after verdict;
 - suggestions that VPN on Demand in iOS 7+ replicates infringing functionality;
 - references to any prior version of FaceTime as infringing;
- Any reference to the prior verdicts or orders regarding willful infringement.
- Any reference to legal proceedings or procedure, such as hearings, the discovery process or orders, including:
 - the parties' positions in those proceedings;
 - the extent to which a party won or lost any disputed issue.

¹ While the parties have met and conferred, VirnetX withheld its submission, a 9-page letter brief, until Friday evening, just minutes before the filing deadline, and thus Apple has not had an opportunity to substantively respond to VirnetX's positions in any meaningful way. While Apple will endeavor to continue to meet and confer with VirnetX prior to the Final Pretrial Conference on Monday, March 26th, Apple requests leave to respond to VirnetX's position prior to any ruling of the Court. Moreover, Apple objects to VirnetX's submission as beyond the scope of the Court's request for a “list of ... what [VirnetX] think[s] some prior determination is going to be relevant to.” 3/20/18 Hr. Tr. at 101.

Dated: March 23, 2018

Respectfully submitted,

By: /s/ Joseph A. Loy

Gregory S. Arovas
greg.arovas@kirkland.com
Robert A. Appleby
robert.appleby@kirkland.com
Jeanne M. Heffernan
jeanne.heffernan@kirkland.com
Joseph A. Loy
joseph.loy@kirkland.com
Leslie M. Schmidt
leslie.schmidt@kirkland.com
David N. Draper
david.draper@kirkland.com
KIRKLAND & ELLIS LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

Akshay S. Deoras
akshay.deoras@kirkland.com
KIRKLAND & ELLIS LLP
555 California Street
San Francisco, CA 94104
Telephone: (415) 439-1400
Facsimile: (415) 439-1500

Michael E. Jones
Texas Bar No. 10969400
mikejones@potterminton.com
POTTER MINTON
A Professional Corporation
110 N. College Avenue, Suite 500
Tyler, Texas 75702
Telephone: (903) 597-8311
Facsimile: (903) 593-0846

Attorneys for Apple Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system pursuant to Local Rule CV-5(a)(3) on this the 23rd day of March 2018.

/s/ Joseph A. Loy